LAU TEK SEN @ LAU BENG CHONG & 3 ORS.

v.

S.K. SONG

HIGH COURT MALAYA, JOHOR BAHRU
DATO' MOHD. GHAZALI BIN MOHD. YUSOFF JC
[CIVIL SUIT NO. 419 OF 1982]
24 FEBRUARY 1995

***CONTRACT**: Agency - Damages for breach of warranty of authority against solicitors - Whether defendant has impliedly warranted that he had authority to act for and was representing the true registered owner of land - Whether defendant's ignorance of fraud perpertrated by defendant's client relevant to plaintiff's claim.*

***CONTRACT**: Quantum of damages for breach of warranty of authority - Whether loss of market value less the contract price too remote - Whether sums expended by the plaintiffs recoverable.*

***TORT**: Whether defendant owed duty of care to the plaintiffs to ensure he was acting as solicitor for the real land owner - Measure of damages for breach.*

The defendant, a practising advocate and solicitor, acted for the vendor of land Geran No. 27017 Lot 960 Mukim of Plentong, District of Johor Bahru, namely Tang Ngon Kong in the sale of the same to the plaintiffs. The purchasers' solicitor's search revealed that the land was free from encumbrances in March 1981 and thereafter both parties entered into a sale and purchase agreement of the land for RM80,750. The plaintiffs made part payment of RM24,225 and the balance 70% was to be paid within three (3) months. It was a condition of the agreement of sale that upon receiving the said balance, the vendor shall execute a valid and registrable memorandum of transfer in favour of the purchasers and shall forward the document of title to the purchasers free from all encumbrances. The balance was paid to the defendant on 1 July 1981 and on 16 March 1982 the amount of RM3,000 retained for real property gains tax was also released.

When the transfer and title were presented by the plaintiff's solicitor for registration, it was rejected due to two caveats, one a Registrar's caveat and the other a private caveat lodged by a purported purchaser of the said land. By that time, the defendant could not contact his client, the vendor.

It was subsequently discovered that the "vendor" had obtained a replacement title by fraud and had used a false identity card. The defendant confirmed that the actual owner of the land was not the person who had met him and instructed him over the sale. The defendant informed the police about the transaction and that he had released the sum of RM67,860.40 to the "vendor" and the sum of RM9,340 to the brokers and retained RM3,000 for real property gains tax. The defendant's client who had fraudulently held himself out to be the actual registered owner of the land was charged for cheating and was convicted.

The true registered owner of the land obtained an order from the Johor Bahru High Court that the title to Geran No. 27017 Lot No. 960 issued in replacement of Geran No. 2234 Lot No. 960 be declared null and void and that Geran No. 2234 Lot No. 960 be restored to the register.

The plaintiffs commenced proceedings for damages for breach of warranty of authority in professing to act for the true registered owner of the said land when in truth he was acting

for someone else and that the defendant owed the plaintiffs a duty of care to ensure that he was acting for the real Tang Ngon Kong, the registered owner of the said land. The defendant argued that there was no warranty and even if so, it was the fraud of his client of which he was innocent. It was argued by the plaintiff that the quantum of damages would be the amount of damages payable by the registered owner which woud be the market value of the land minus the contract price.

Held:

[1] A warranty is a form of guarantee assurance or undertaking that is collateral to another contract independant to it, the breach of which may give rise to a claim for damages regardless of whether the aggrieved party can treat the contract as repudiated. It may be express or implied by law. It is implied where any person purports to do any act or make any contract as agent on behalf of a principal i.e. the agent is deemed to warrant that he has in fact authority from such principal to do the act or make the contract. If such an agent has no such authority, he is liable to be sued for breach of warranty of authority by any third person who was induced by his conduct to believe that he had the authority to do the act or make the contract and who by acting upon such belief, has suffered loss in consequence of absence of authority. On the facts, it shows that the defendant *bona fide* believed he had the authority to act as agent and had no reason to suspect his cient's fraud.

[2] However, the principle is that it is irrelevant that the defendant was an innocent party of the client's fraud and was misled by the client. Good faith alone will not protect the defendant. On the facts, it is clear that the defendant never had authority to act for the registered owner of the said land and failed to ensure that he was acting for that person. Throughout the whole transaction, the defendant had represented to the plaintiffs and their solicitor that he had authority to act for the registered owner which in fact he had not and is liable on an implied contract that he had authority whether there was fraud or not.

[3] The defendant also owed a duty of care to the plaintiffs which duty ensued during the pre-contractual negotiations and survived the making of the written contract which was the outcome of the negotiations and is therefore liable for damages for tort of negligence.

[4] If both the damages in contract and tort are awarded, it would be a double recovery which would cause injustice to the defendant. The measure of damages has to be based on the actual damages and actual expenses.

[5] The amount which the plaintiffs may have recovered as the difference between the market value and the contract price is too remote as the agreement of sale is not enforceable against the defendant's client as he never had ownership or interest in the said land. Therefore the damages awarded would be the purchase price paid, the brokers fees and the fees and disbursements paid by the plaintiffs to their solicitors.

[Plaintiff's claim granted with costs].

Cases referred to:

Yonge v. Toynbee [1908 - 10] ALL ER Rep. 204 ***(refd)***
Ratcliffe and Anor. v. Watters and Anor. [1969] 2 NSWR 146 ***(refd)***
Esso Petroleum Co. Ltd. v. Mardon [1976] 1 QB 901 ***(refd)***
Simmons v. Liberal Opinion Limited, In re Dunn [1911] 1 KB 966 ***(refd)***
Midland Bank Trust Co. Ltd. and Anor. v. Hett, Stubbs & Kemp (A Firm) [1979] Ch 384 ***(refd)***

Legislation referred to:

National Land Code, s. 340(2)

Sales of Goods Act 1957 (Revised - 1989), s. 12(3), (4)

Other sources referred to:
Osborn's Concise Law Dictionary, 7th Edn.
Jowitt's Dictionary of English Law, 2nd Edn., Vol. 2.
Chitty on Contracts, 25th Edn., Vol. 1., p. 758, Vol. 2., p. 2286.
Halsbury's Laws of England 4th Edn., Vol. 1, p. 515, para. 857.
The Sale and Purchase of Real Property in Malaysia (Singapore Butterworths - 1984), p. 9

For the plaintiffs - Humphrey Ball; M/s. Bashir & Co.
For the defendant - R.A. Kumar (S.L. Song with him); M/s. S.K. Song

JUDGMENT

Mohd. Ghazali bin Mohd. Yusoff JC:

The plaintiffs have brought an action against the defendant, an advocate and solicitor of the High Court of Malaya practising in Johor Bahru under the name of S.K. Song, for damages for breach of warranty of authority with regard to an agreement of sale of a piece of land known as Geran No. 27017 Lot 960, in the Mukim of Plentong, in the district of Johor Bahru, in the State of Johor, comprising an area of 5 acres 0 roods and 24 poles (hereafter referred to as "the said land") registered in the name of one Tang Ngon Kong.

The plaintiffs' case was that sometime in March 1981, the second plaintiff (PW2) came to know through a broker, one Eng Siang Sang, that the said land was for sale, and consequently on 22 March 1981, informed his solicitor, one Tan Kiah Teck @ Tan Hong Chiang (PW1), that he, together with the first, third and fourth plaintiffs, were keen on purchasing the said land. PW2 also informed PW1 that the selling price was RM80,750 and that the defendant is the solicitor who will be acting for the registered owner and requested that PW1 make a search with the land office.

When the search revealed that the said land was free from encumbrances, PW1 wrote to the defendant on 24 March 1981 informing the latter that he was acting for the plaintiffs who are agreeable to purchase the said land from the registered owner, Tang Ngon Kong "for whom we understand you act". By a letter dated the same day, the defendant informed PW1 that his client, the registered owner, was interested in entering into an agreement of sale of the said land with the plaintiffs and offered a choice of two terms of payment.

On 25 March 1981 PW1 informed the defendant by letter that the plaintiffs have agreed to one of the terms of payment as suggested, namely, a deposit and part payment of 30% of the purchase price upon the signing of the agreement and the balance to be payable within three months from the date of the agreement. PW1 also requested the defendant to forward to him the proposed agreement of sale which was subsequently prepared and sent on 29 March 1981.

On 1 April 1981 PW1 returned three copies of the said agreement duly signed by the plaintiffs and a cheque for RM24,225 being part payment of the purchase price on the undertaking that the defendant forward the said agreement of sale duly signed by the latter's client for PW1's further attention.

The agreement of sale was duly executed and dated 2 April 1981, showing the vendor/registered owner as Tang Ngon Kong (NRIC No. 0357684) and the four plaintiffs as the purchasers. The agreement also stated that the selling price was RM80,750 and that RM24,225 has been paid as deposit and part payment of the total purchase price and that the balance of RM56,525 is to be paid on or before 2 July 1981. It was also a condition of the agreement

of sale that the vendor shall immediately upon receiving the said balance "secure or sign and execute a valid and registrable memorandum of transfer of the said land in favour of the purchasers or the purchasers' assigns and shall forward the document of title to the purchasers free from all encumbrances".

On 1 July 1981 PW1 sent the balance of the purchase price, namely, RM53,525, after deducting the sum of RM3,000 as retention for the purpose of real property gains tax, to the defendant who then forwarded a receipt for it together with a memorandum of transfer and the adjudication forms duly executed by the vendor. On 16 March 1982 the defendant forwarded a copy of the certificate of clearance from payment of real property gains tax from the Director-General of Inland Revenue and requested for the release of the said sum of RM3,000 which was on the same day released by PW1 to the defendant.

Subsequently the transfer document and title deed was presented by PW1 to the land office for registration in favour of the plaintiffs. However, sometime in May 1982, PW1 was informed that his application for registration of the transfer was rejected by the land office on the ground that two caveats have been lodged on the said land, which, according to PW1, were not there when he made a search of the said land in March 1981.

On 26 May 1982 PW1 wrote to the defendant informing him about the said rejection by the land office and contending that the defendant's client was in breach of one of the terms and conditions of the agreement, namely, to sell the land to the plaintiffs free from encumbrances. PW1 then requested the defendant to inform his client to remove the caveats so that the transfer could be registered without further difficulties.

On 27 May 1982 PW1 informed the defendant by letter that one of the caveats is a Registrar's caveat and that the other is a private caveat lodged by one Sin Lai Chai who contends that the said Tang Ngon Kong, the registered owner, had sold the said land to him on 22 September 1979 for RM40,000 and that 10% of that amount has been paid to the registered owner.

On 9 June 1982 the defendant by letter informed PW1 that he was unable to contact his client at his last address and in the same letter stated that he is unable to return the said RM3,000 retention sum for real property gains tax as he was instructed to retain the same.

Upon making further enquiries, PW1 discovered that a person by the name of Tang Ngon Kong, who is holding a red Singapore identity card No. 0357684 A and who claims to be the true registered owner of the said land, had called at the land office and had shown the original title to the said land, namely, Geran No. 2234 Lot 960. PW1 made arrangements to meet that said Tang Ngon Kong and was then informed by the latter that he had purchased the said land on 21 May 1973 which was then held under Geran No. 2234 Lot 960 and that the title deed was subsequently registered in his name on 12 September 1973. That said Tang Ngon Kong also informed PW1 that in August 1981, he came to know that another person had made an application and succeeded in getting the relevant authority to replace the title deed for the said land, that is, Geran No. 2234 Lot 960, on the ground that it was lost when in fact it has been in his custody all the while and that was why he had instructed his solicitors to report the matter to the land office on 29 August 1981.

Upon making enquiries with the National Registration Department, Malaysia, PW1 was informed that a blue Malaysian identity card bearing No. 0357684 was issued to a Malay lady from Perak. He was also informed that it was not possible for a red Malaysian identity bearing that same number to be issued to any other person.

At the request of the defendant, PW1 sent the said Tang Ngon Kong, the holder of the red Singapore identity card, to meet the defendant and subsequently, by letter dated 17 July 1982, the defendant informed PW1 that that Tang Ngon Kong who had called upon him was not the same Tang Ngon Kong who was his client. He also informed PW1 that his client who had held himself out to be Tang Ngon Kong had earlier identified himself by producing to him a blue Malaysian identity card No. 0357684 bearing that name.

Meanwhile, upon realising that he had been duped by his client who obviously had masqueraded as the registered owner, Tang Ngon Kong, the defendant wrote to the police on 15 July 1982 giving the details with regard to the transaction and his failure to contact his client. He also informed the police that he had released a net total of RM67,860.40 to his client and the sum of RM9,340 to his client's brokers whilst retaining the sum of RM3,000 for the purpose of read property gains tax and which sum is still kept in his client's account.

The police treated that letter as a police report and investigated the matter and subsequently the defendant's client who had fraudulently held himself out to be Tang Ngon Kong, the registered owner of the said land, was arrested and charged for cheating and was subsequently found guilty and convicted.

On 6 July 1983, on the application of the true registered owner of the land, Tang Ngon Kong, the High Court at Johor Bahru granted an order that the title Geran No. 27017 Lot No. 960 issued in replacement of Geran No. 2234 Lot No. 960 be declared null and void and that Geran No. 2234 Lot No. 960 be restored to the register.

On 27 July 1982 PW1 wrote to the defendant informing him that in the transaction leading to the agreement of sale of the said land, the defendant had warranted that he was acting for Tong Ngon Kong, the registered owner of the said land, when in actual fact, the Tong Ngon Kong for whom he acted was not who he claimed to be. PW1 also informed the defendant that the latter had attested in the agreement of sale and in the transfer form which tantamounted to warranting that the person who signed it was the true identity of Tang Ngon Kong when in fact he was misled. That being so, PW1 contended that, under the circumstances, there is a breach of contract on the defendant's part and that he is liable to pay for damages for the breach. He then suggested that the matter be settled amicably.

Since no settlement was in sight, the plaintiffs commenced proceedings against the defendant claiming for damages on the following grounds, namely, that the defendant is liable for:

(a) breach of warranty of authority in professing to act for the true registered owner of the said land when in truth he was acting for someone else;

(b) for breach of express and/or implied condition that he was to forward a duly executed agreement of sale and a duly executed and attested proper and registrable memorandum of transfer (Form 14A) to the plaintiffs;

(c) that the defendant owed the plaintiffs a duty of care to ensure that he was acting for the real Tang Ngon Kong, the registered owner of the said land; and

(d) further or in the final alternative, the consideration for the payment, that is the said total sum of RM85,082 has wholly failed.

At the trial, the Court was informed that the plaintiffs have decided to restrict their claim to only grounds (a) and (c) above; thus the issues remaining to be determined by the Court are as follows:

(i) whether there has been a breach of warranty of authority on the part of the defendant; and

(ii) whether the defendant owed a duty of care to the plaintiffs to ensure that he was acting for the real landowner.

To me, the first issue leads to the question as to "what is a warranty?" According to *Osborn's Concise Law Dictionary* (7th Edn.), a "warranty" is "a guarantee or assurance".

It would be useful to note that s. 12(3) of the Sales of Goods Act 1957 (Revised-1989) defined a "warranty" as follows:

> A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated.;

and s. 12(4) of the same Act provides:

> Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract.
>
> The stipulation may be a condition, though called a warranty in the contract.

The Sale of Goods Act is of course not applicable to land transactions and the word "goods" do not encompass real property, however the provision referred to is a useful aid in approaching the question as to "what is a warranty".

Jowitt's Dictionary of English Law, Vol. 2 (2nd Edn.), with regard to the word "warranty", states:

> A warranty may be express or implied by law or statute.
>
> Implied warranties have been said to underlie or to be the gist of actions for negligence or breach of duty arising out of the special relations between parties (*Coggs v. Bernard* [1703] 2 Ld. Raym. 909).
>
> When a man holds himself out as the agent of another he is deemed to warrant his authority to act as agent, and if, and in so far as, he is without such authority as he purports to have, an action for breach of warranty of authority will lie against him for one damnified by such absence of authority.

Chitty on Contracts, Vol. 1 (25th Edn.) discusses warranties, at p. 758, as follows:

> The word "warranty" has been described as "one of the most ill-used expressions in the legal dictionary". In many older cases, it was used in the sense of "condition" and today it is very frequently used simply in the sense of a contractual undertaking or promise. In its most technical sense, however, it is to be understood as meaning a term of the contract, the breach of which may give rise to a claim for damages but not to a right to treat the contract as repudiated. The use of the word "warranty" in this sense is reserved for the less important terms of a contract, or those which are collateral to the main purpose of the contract, the breach of which by one party does not entitle the other to treat his obligations as discharged.

At the same page, the author went on to discuss a type of warranty which he termed as "collateral warranties", *viz*:

> Undertakings may be given that are collateral to another contract. They may be considered to be independent of that other contract either because they cannot fairly be regarded as having been incorporated therein, or because rules of evidence hinder their incorporation, or because

the main contract is defective in some way, or because it is made between parties other than those by or to whom the undertaking is given. Such undertakings are often referred to as collateral contracts, or "collateral warranties".

Based on the above references, it would seem that a warranty can be said to be a form of a guarantee, assurance or undertaking that is collateral to another contract and simultaneously independent of that contract, the breach of which may give rise to a claim for damages regardless of whether the aggrieved party can treat the other contract as repudiated.

As stated above, a warranty may also be express or implied by law. With regard to what amounts to an "implied warranty of authority" is best described in para. 857 (at p. 515) of *Halsbury's Laws of England* Vol. 1 (4th Edn.) which reads:

Warranty implied. Where any person purports to do any act or make any contract as agent on behalf of a principal, he is deemed to warrant that he has in fact authority from such principal to do the act or make the contract in question. If, therefore, he has no such authority, he is liable to be sued for breach of warranty of authority by any third person who was induced by his conduct in purporting to act as agent to believe that he had authority to do the act or make the contract, and who, by acting upon such belief, has suffered loss in consequence of the absence of authority.

The agent's belief in the existence of his authority is immaterial, whether the belief extends to an authority which the agent believed that he had but in fact never had, or to an authority which the agent originally had but which has ceased without his knowledge or means of knowledge. He will not, however, be liable if at the time of doing the act or making the contract he expressly disclaims any present authority, or if the other party knows that he has no authority, or is fully acquainted with the facts from which the inference of authority is drawn.

In *Chitty on Contract*, Vol. 2 (25th Edn.), at p. 2286, the author said:

It is not necessary that the representation of authority should be made expressly: merely purporting to act as agent will normally constitute a representation. Thus a solicitor who institutes an action thereby sufficiently warrants that he is properly authorised to do so, even though he makes no express statement to that effect.

Looking at the facts of the instant case with reference to the above discussion, can it be said that the defendant has impliedly warranted throughout the transaction leading to the signing of the agreement of sale that he had the authority to act for and was representing the true registered owner of the said land?

The facts seem to show that the defendant *bona fide* believed from the outset that he had, but in fact had not, authority to act as agent for the true registered owner of the said land in the transaction for sale of that land. The facts also seem to show that he had reasonable grounds to believe that his client was Tang Ngon Kong, the true registered owner of the said land, and that he was justified in believing so as his client had produced an identity card bearing that name. This name also appeared in the title deed of the said land, namely, Geran No. 27017 Lot 960, which was also produced by his client. Furthermore, that client was introduced to him as being the registered owner of the said land by the two brokers, who, according to the defendant, were his social and casual acquaintances. Thus, it would seem that under such circumstances, he had no reason to suspect or believe that his client could have produced a false identity card.

However, the question which has arisen is whether all the above circumstances constitute a good defence for the defendant and absolve him from any liability towards the plaintiffs' claim. On this issue, the authorities cited by learned Counsel for the plaintiffs seem to show that the fact that the defendant was an innocent party of a fraud perpetrated by his client

would seem to be irrelevant in an action against him for damages for breach of warranty of authority. His position in the transaction or the role that he played in the transaction would still remain that he never had authority from the true registered owner of the said land to act for him in the agreement of sale. His defence that he was misled by his client seems totally irrelevant in an action of this nature. Within this context, Counsel for the plaintiffs referred to the case of *Yonge v. Toynbee* [1908 - 10] ALL ER Rep. 204, where Buckley LJ said (at p. 206):

> I can see no distinction in principle between the case where the agent never had authority and the case where the agent originally had authority but that authority had ceased without his knowledge or means of knowledge. In the latter case, as much as in the former, the proposition, I think, is true - that without any *mala fides* he has at the moment of acting represented that he had an authority which in fact he had not. In my opinion he is then liable on an implied contract that he had authority whether there was fraud or not.

Buckley LJ went on to say, at p. 207:

> The question is not as to his honesty or *bona fides*. His liability arises from an implied undertaking or promise made by him that the authority which he professes to have does in point of fact exist.

The facts of *Yonge v. Toynbee*, *supra*, are as follows:

On 21 August 1908, the defendant, against whom the plaintiff was threatening to institute an action for libel, instructed a firm of solicitors to act for him. On 8 October 1908, unknown to his solicitors, the defendant was certified to be insane. Meanwhile, prior to that date, the solicitors had undertaken to accept service of the writ on the defendant's behalf and enter an appearance for him, and on 6 November 1908 entered an appearance.

The plaintiff however discontinued this action but on 19 December 1908 brought a second action against the defendant. On 21 December the defendant's solicitors undertook to accept service and enter an appearance in that action and on 30 December 1908 an appearance was entered. In January and February 1909, pleadings were delivered by both sides. On 5 April 1909 the solicitors for the first time learned of the defendant's incapacity.

The plaintiff then took out a summons asking that the appearance and all subsequent proceedings in the action be set aside and that the defendant's solicitors might be ordered to pay personally to the plaintiff all the costs of her action against the defendant up to date, on the ground that they had no authority to appear and defend.

The Court of Appeal held that although the defendant's solicitors had acted throughout in good faith and without knowledge of the defendant's mental condition, they were personally liable to pay the costs upon an implied warranty or contract that they had an authority, which in fact they had not. The Court was of the view that an agent's liability in such cases arise not from any wrong or omission of right on his part, but from an implied contract - an implied undertaking or promise - make by him that the authority which he professes to have does in fact exist.

Although the facts of *Yonge v. Toynbee, supra*, are different from that found in the instant case, namely, that no fraud was perpetrated by the solicitor's client in that case, I am of the view that the principle laid down in that case would similarly be applicable here. In his judgment in that case, Swinfen Eady J, said (at p. 209):

> Under such circumstances good faith alone will not protect them, and they are liable to pay the costs of the party misled:

and at the same page, Swinfen Eady J went on to say:

> Where an agent represents that he has authority to do a particular act, and he has not such authority, and another person is misled to his prejudice, the ground upon which the agent is held liable in damages is that there is an implied contract or warranty that he had the authority which he professed to have.

And at p. 211, Swinfen Eady J said:

> The manner in which business is ordinarily conducted requires that each party should be able to rely upon the solicitor of the other party having obtained a proper authority before assuming to act.

In the instant case, in acting for his client, that is, the person who had masqueraded as the registered owner of the said land, the defendant became the solicitor responsible for that person. The various correspondence adduced in evidence shows that the defendant had represented that his client was the registered owner and hence qualified to sell the said land.

I am also of the view that there is an element of negligence attributable to the defendant when it was later discovered that his client was not the person that he made out to be, that is, the registered owner. The defendant may have been misled, as he says he was, by the identity of that person but all that, as discussed above, seems to be totally irrelevant; as stated by Swinfen Eady J in *Yonge v. Toynbee*, *supra*, at p. 211:

> It is in my opinion, essential to the proper conduct of legal business that a solicitor should be held to warrant the authority which he claims of representing the client, if it were not so, no one would be safe in assuming that his opponent's solicitor was duly authorised in what he said or did, and it would be impossible to conduct legal business upon the footing now existing, and, whatever the legal liability may be, the Court, in exercising the authority which it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority.

In the instant case, the defendant had asserted that he has the authority of the registered owner, Tang Ngon Kong, and by this had induced the plaintiffs to enter into the agreement of sale of the said land which the plaintiffs would not have entered into but for that assertion, and since that assertion has turned out to be untrue, to the injury of the plaintiffs, to whom it was made, it must be taken that when the defendant made the assertion, he undertook that it was true, and that being so, I find that he is liable personally for the damage that had occurred.

In his evidence, defendant claimed that before his client signed the agreement of sale, he looked at the latter's identity card which looked genuine; he had no cause to suspect that it could be a false identity card. He also contended that the title deed which was produced to him by his client was a genuine title deed; his client even produced the current quit rent receipt. He further contended that he acted with extra caution in conducting the transaction and argued that he had even made a search and had confirmed to PW1 that there were no encumbrances on the said land, even though it is not a common practice for a vendor's solicitor to make a search. With regard to this issue on search, Counsel for the defendant referred to a book written by Professor Visu Sinnadurai entitled "*The Sale and Purchase of Real Property in Malaysia*" (Singapore Butterworths - 1984), at p. 9, where the learned author was of the view that:

> ... before the purchaser enters into a legally binding contract with the vendor for the sale and purchase of the property, the purchaser's solicitor will have made a search in the State Registry to investigate the vendor's title;

A similar duty rests on the purchaser's solicitors to make another search of the title before the balance of the purchase price is paid to the vendor. This is to ensure that no new encumbrance has been created over the land since the last search was conducted, usually six months before;

Failure on the part of the solicitor to make necessary search may amount to negligence on his part.

Under the circumstances, I fail to see the relevance of this reference. Whether PW1 is under a duty to make another search before releasing the balance of the purchase price to the defendant is not in issue in the instant case. What is in issue here is whether the defendant had from the outset of the transaction, warranted that he was acting for the true registered owner of the said land. With respect, from my reading of the views elucidated by Professor Visu, I am of the view that they only amount to no more than an expression of opinion and do not actually establish a practice or general standard, after all, in most agreements of sale and purchase of land, it is a term and condition of the agreement of sale that the vendor shall sell the land free from encumbrances. A second search made by the purchaser's solicitor may be appropriate under certain circumstances, for example, where it has come to his knowledge that there could be other claimants to the property which is not reflected in the register, but generally, I do not think that it is the duty of the purchaser's solicitor to make a further search before the balance of the purchase price is paid to the vendor.

Counsel for the defendant also submitted that the defendant had acted in a manner of a competent solicitor in ascertaining the identity of his client. He also argued that there should be no objection with regard to the transfer form, that is, Form 14A (p. 21 of the plaintiffs' agreed bundle of documents), wherein the defendant had stated that the identity of the vendor is only according to his knowledge; that statement in the said Form 14A (p. 22 of the plaintiffs' agreed bundle of documents) reads as follows:

Saya, Song Sing Kwee, Seorang Peguambela dan Peguamcara di Mahkamah Tinggi di Johor Bahru, Johor, Malaysia, dengan ini mengaku bahawa tandatangan yang di atas itu telah ditulis di hadapan saya pada 6 haribulan Julai, 1981, dan adalah:

(a) mengikut pengetahuan saya sendiri

(b) (**deleted**)

dan maklumat itu saya percayai dengan sesungguhnya, tandatangan yang benar bagi Tang Ngon Kong yang telah mengaku kepada saya

(i) bahawa ia adalah cukup umar,

(ii) bahawa ia telah menyempurnakan suratcara ini dengan sukahatinya sendiri, dan

(iii) bahawa ia faham akan kandungan suratcara itu dan natijahnya.

Disaksikan dengan tandatangan saya pada 6 haribulan July, 1981.

(sign.)
S.K. SONG
Advocate And Solicitor
Johor Bahru.

Counsel for the defendant further argued that the identity card, the title deed, the quit rent receipt and the existence of brokers in the transaction accumulatively would satisfy a competent and cautious solicitor that he was acting for Tang Ngon Kong, the registered

owner of the said land. To support his argument, he referred to the case of *Ratcliffe andAnor. v. Watters and Anor*. [1969] 2 NSWR 146 which is a decision of the Supreme Court of New South Wales. In that case the facts are as follows:

The second defendant was the registered proprietor in fee simple of a piece of land. The first defendant, his daughter, by means of a forged authority purporting to be signed by the second defendant (her father), fraudulently obtained the certificate of title to the land from solicitors holding it on behalf of the second defendant.

The second defendant then went to see another solicitor to whom she was introduced by an officer of a finance company and indicated that she wished to borrow RM6,000 for three years on the security of the land.

The plaintiffs, who were clients of the solicitor, agreed to lend money to the first defendant by way of mortgage and left the details of the transaction and the conduct of the matter to the solicitor. The first defendant subsequently brought with her a guarantor of the loan and another person masquerading as her father, the second defendant (i.e., the registered proprietor). The necessary documents prepared by the solicitor were later executed and in the memorandum of transfer pursuant thereto, the purported signature of the second defendant as personally known to the solicitor being attested by him.

On satisfactory completion of his requirements, the solicitor caused the transfer and mortgage to be lodged for registration which was effected.

Later due to default having been made under the mortgage, the plaintiffs commenced an action in ejectment to recover possession of the land and the dealings therewith came to the knowledge of the second defendant who resisted the claim of the plaintiffs in the ejectment action, namely, he challenged the validity of the mortgage. One of the arguments that he put forth was that the authority of the solicitor was such as to render him the agent for all relevant purposes of the plaintiffs and that in his handling of the transaction, he was recklessly indifferent so far as concerned the identification of the registered proprietor and transferor to such a degree as to be tantamount to a fraud on the registered proprietor.

The Supreme Court of New South Wales held that there was no act or omission on the part of the solicitor going to the length of rendering him party to a course of conduct so reckless as to be tantamount to fraud, Street, J at p. 151, said:

> ... the facts of the present case do not warrant a finding of recklessly indifferent conduct. The solicitor was, perhaps, incautious in certifying that he personally knew the individual who signed as transferor. But this does not seem to me to differ from what any one of a great many solicitors might well have done in similar circumstances. There is no basis for criticizing him for not having been, or caused some person to go, to the premises, or for having omitted to communicate in any other way with the registered proprietor. Nor is there any basis for criticizing him for not having sent out the statutory notice of sale earlier.
>
> I reject the challenge made to the validity of the transaction in so far as that challenge rests upon an attack on the conduct of the solicitor for the mortgagees.

With respect, I do not think that the authority referred to above has any bearing upon the instant case. Although the facts there, to a certain extent, were quite similar in that it was the solicitor who, in total innocence of any fraudulent intent himself or knowledge or suspicion of such intent on the part of the first defendant and the person masquerading as the second defendant, the registered proprietor, handled the conveyancing transactions that were relevant

to the suit, the issue of breach of warranty of authority by the solicitor was not the main subject-matter of the suit; it is the validity of the mortgage which was in dispute. Anyway, the ground put forth by the second defendant when he challenged the validity of the plaintiffs' mortgage was rejected by the Judge as it relates essentially to the conduct of the solicitor. Furthermore the solicitor concerned was not a party to the suit.

At this stage of my grounds of decision, I reiterate my finding that the defendant is liable upon an implied warranty or contract that he had an authority which he had not and it is my decision that the plaintiffs are entitled to succeed, and to have an order against the defendant for damages.

With regard to the second issue being pursued by the plaintiffs, which is essentially one of tort, I am of the view that the defendant owed a duty of care to the plaintiffs which duty existed during the pre-contractual negotiations and survived the making of the written contract which was the outcome of the negotiations. Therefore the defendant would also be liable to the plaintiffs for damages for the tort of negligence.

PW2 who gave evidence on behalf of the plaintiffs stated that he had never met the registered owner/vendor and that he only dealt with the broker; and that broker only supplied him the title number and informed him that the defendant will be acting for the vendor. I am inclined to believe PW2. This is hardly surprising as this is a case of a land transaction in which a broker is involved. The defendant, on the other hand, upon receipt of PW1's first letter, confirmed that he was acting for the registered owner/vendor. That being so, PW1 and the plaintiffs would definitely assume that the defendant had the authority to act and they were never at all in a position to ascertain otherwise. Hence, under such circumstances, it has to be implied that the defendant had throughout the transaction represented as such and when it turned out to be otherwise, his representation amounted to a negligent representation. As such, it is my finding that the defendant is also liable for damages for the tort of negligence as the circumstances have given rise to the duty to take reasonable care to see that his representation was correct. The circumstances which can give rise to such duty is best illustrated by the case of *Esso Petroleum Co. Ltd. v. Mardon* [1976] 1 QB 901; the facts are as follows:

In 1963, the plaintiff, the owner of a petrol filling station in Southport, England, entered into a written tenancy agreement for three years with the defendant. During discussions between the parties prior to the signing of the agreement, the plaintiff's servants suggested that the filling station had a potential selling capacity of 200,000 and 250,000 gallons per annum whilst the defendant suggested that 100,000 and 150,000 was more likely, the Judge found that his doubts were quelled by his trust in the greater experience and expertise of the plaintiff's servants.

However, despite his best endeavours, the defendant found that throughout for the first 15 months was only 78,000 gallons, and subsequently, as he suffered more losses due to poor sales, he could not meet the rental; furthermore, the plaintiff cut off its petrol supply to him.

In 1966 the plaintiff issued a writ claiming possession of the premises, money owed and mesne profits. The defendant consequently gave up possession and counterclaimed for damages for breach of warranty as to the potential throughput, and alternatively for negligent misrepresentation by virtue of which he had been induced to enter into the contract.

The Court of Appeal held that the statement as to the potential throughput was a contractual warranty and was made with the intention of inducing the other party to enter into the contract of tenancy and that it did induce the defendant to enter into the contract and

therefore the plaintiff was in breach of the warranty and liable in damages for the breach. The Court further held that in any event the statement was a negligent representation made by a party holding himself out as having special expertise in circumstances which gave rise to the duty to take reasonable care to see that the representation was correct; that that duty of care existed during the pre-contractual negotiations and survived the making of the written contract which was the outcome of the negotiations; and that therefore the plaintiffs were also liable for damages for the tort of negligence.

In the instant case it is clear that the defendant never had authority to act for the registered owner of the said land and he had failed to ensure that he was acting for that person. He had prepared the agreement and had even managed to obtain clearance on behalf of his client from the Director-General of Inland Revenue from paying real property gains tax. Throughout the whole transaction the defendant had represented to the plaintiffs and their solicitor, PW1, that he had authority to act for the registered owner of the said land which in fact he had not, and thus to me he is liable on an implied contract that he had authority, whether there was fraud or not. In *Simmons v. Liberal Opinion Limited, In re Dunn* [1911] 1 KB 966, at p. 971, Cozens-Hardy MR said:

> A solicitor must be held to warrant the authority which he claims as representing his client. *Yonge v. Toynbee* is a recent illustration of this well-established principle.

Neither the plaintiffs nor their solicitor were in a position to challenge the acts of the defendant as solicitor to the registered owner/vendor in the transaction. The plaintiffs and their solicitor were bound to treat the defendant's actions as acts authorized by the true registered owner himself. That being so I am of the view that if it were not held that the defendant warrants that he has authority from the true registered owner to do all the things necessary for the transaction, the gravest injustice may be done to the plaintiffs.

The defendant, as contended by him, has acted in total innocence; he had *bona fide* acted for a client who had masqueraded as the registered owner of the said land, but then the well-established principles referred to above do not seem to render him much assistance. Harsh though it may be, this seems to be the position.

The Court has to treat the defendant as having warranted his authority to act for the true registered owner of the said land and accordingly hold him liable to pay damages and the costs of the plaintiffs in this action.

As to the computation of damages, this seems to present a difficult problem - how does one measure damages in an action of this nature?

Damages has been defined as the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong. According to *Osborn's Concise Law Dictionary* (7th Edn.), "damages" means:

> Compensation or indemnity for loss suffered owing to a Tort or breach of contract or breach of some statutory duty committed by some other person. The principle is that the injured party should be put as nearly as possible in the same position, so far as money can do it, as if he had not been injured. Damages from the same cause must be recovered once and for all.

In this action, the plaintiffs have succeeded and is entitled to judgment based upon prayer (a), referred to above, which essentially is one of contract and prayer (b), referred to above, which essentially is one of tort. Thus there are two quite separate heads of liability.

On prayer (a), the correct measure of damages would need to be based on contract principles, namely, an award which serves to put the plaintiff into the position he would have been in if the representation had been true. On prayer (b), the correct measure of damages in tort would be an award which serves to put the plaintiff into the position he would have been in if the representation had not been made to him. In my opinion, the difficult problem would be with regard to the computation of damages based on contract principles.

The defendant has been sued in contract as well as in tort; this is similar to the situation in *Midland Bank Trust Co. Ltd. and Anor. v. Hett, Stubbs & Kemp (A Firm)* [1979] Ch 384 where it has been held that a solicitor may be sued in tort as well as in contract for negligent performance of what he has undertaken. Although the facts of that case are quite different from that of the instant case, namely, in that case the suit is by a client against solicitors who acted for him, the principle that a contract creates a duty and the neglect to perform that duty is a ground of action upon a tort, would equally be applicable here. But the question which has arisen here is, if two sets of damages are awarded, that is, both in contract as well as in tort, that would amount to a double recovery which, in my view, would cause injustice to the defendant as the plaintiffs, as the injured party, will be put in a better position than he would have been in if he had not sustained the wrong for which he is getting compensation.

The object of an award of damages is only to give the plaintiffs compensation for the damage, loss or injury he has suffered and thus the measure of damages has to be based on the actual damage directly from the representation, and actual expenses incurred are also recoverable in the form of damages.

Besides having paid the sum of RM80,750 for the proposed purchase of the said land, the plaintiffs have claimed that they had spent RM1,615 as broker's commission and RM2,717 in legal fees. However, with regard to the payment of their legal fees, the documentary evidence produced by the plaintiffs only show a receipt issued by Tan & Tan, that is, the plaintiffs' solicitors, for the sum of RM1,700 for costs and disbursements; the sum of RM2,717 claimed has not been substantiated. The evidence shows that the defendant has released the sum of RM77,750 to his client and has retained RM3,000 which was meant for real property gains tax and which is still kept in his client's account.

On the issue of damages, Counsel for the plaintiffs contended that the land was subsequently valued by the Government stamp duty office at a market price of RM130,000 on 27 January 1982 (p. 25 of the plaintiffs' agreed bundle of documents) and that the land is still appreciating in value. In reply, Counsel for the defendant argued that the valuation by the stamp office was done for revenue purposes and cannot be used as a yardstick for the plaintiffs' claim.

From my reading of his argument, Counsel for the plaintiffs seems to suggest that since it has been found that the defendant had no authority from the true registered owner of the said land, the measure of indemnity for breach of warranty will therefore ordinarily be the amount which the plaintiffs would have recovered from the registered owner if the latter had been bound and had broken the contract. If I am correct, the contention seems to be that the plaintiffs can be in a position to recover the market value of the said land less the contract price.

To me, such a loss is too remote. The agreement for sale is null and void as the defendant's client never had any title or interest in the said land which he can transfer to the plaintiffs. The defendant's client never had ownership nor interest in the said land, that is, he had nothing that could constitute something that the plaintiffs have lost by being unable to sue

the defendant's client. The agreement of sale is definitely not enforceable against the defendant's client. The agreement for sale cannot produce any result and therefore no transfer can be registered.

The title which the defendant's client produced, namely, Geran No. 27017 Lot 960, although being a genuine title issued by the proper authority, has been defeated by the provisions of s. 340(2) of the National Land Code when the true registered owner of the said land obtained the Court order to declare it null and void. From the outset, it is clear that the plaintiffs were never in a position to purchase the land as the defendant's client had no title to pass. Thus I would think consequential losses from non-performance of the agreement of sale has ceased to have any relevance.

With regard to interest, Counsel for the defendant argued that the Court has a discretion to grant interest on the sum awarded as damages but that any interest granted should be restricted in time. He also suggested that any interest awarded should not be more than 4%.

The facts show that the plaintiffs had expended the following sums on the following dates, namely:

(i) 1 April 1981	-	RM24,225 (30% part-payment of purchase price);
(ii) 1 July 1981	-	RM56,525 (balance of purchase price);
(iii) 1 July 1981	-	RM1,615 (broker's fees)
(iv) 28 February 1982	-	RM1,700 (costs and disbursements towards Tan & Tan, plaintiffs' solicitors).

The damage which has occurred to the plaintiffs is represented by the various sums of money, as listed above, which they have expended on those dates, and, in my opinion, it is these sums which I would order that the plaintiffs are entitled to recover as damages under both heads of liability. Accordingly, I order that the plaintiffs are entitled to recover as damages the various sums of money totalling RM84,065 with interest at the rate of 6% per annum from the dates those sums were expended by them until the date of judgment and interest at the rate of 8% per annum on the total sum of RM84,065 from the date of judgment until realisation, and costs.